MOTION FILED
FEB 13 1985

No. 84-1258 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

—v.—

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SALOMON BROTHERS INC; SMITH BARNEY, HARRIS UPHAM & CO. INCORPORATED; PRUDENTIAL-BACHE SECURITIES INC.; AND MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

LAURENCE H. TRIBE
1525 Massachusetts Avenue
Griswold Hall 307
Cambridge, Massachusetts 02138
(617) 495-1767

HERBERT M. WACHTELL*
LAWRENCE B. PEDOWITZ
WAYNE M. CARLIN
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for Amicus Curiae
Salomon Brothers Inc

**Counsel of Record*

(Counsel continued on inside front cover)

PHILIP C. POTTER, JR.*
DAVIS POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

Counsel for Amicus Curiae
Smith Barney, Harris
Upham & Co. Incorporated

LEONARD JOSEPH*
DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
140 Broadway
New York, New York 10005
(212) 820-1100

Counsel for Amicus Curiae
Prudential-Bache
Securities Inc.

WILLIAM F. KOEGEL*
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000

Counsel for Amicus Curiae
Merrill Lynch, Pierce,
Fenner and Smith,
Incorporated

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, Salomon Brothers Inc; Smith Barney, Harris Upham & Co. Incorporated; Prudential-Bache Securities Inc.; and Merrill Lynch, Pierce, Fenner and Smith, Incorporated respectfully move for leave to file a brief *amicus curiae* in the above-captioned proceedings, and in support thereof state:

1. While the petitioners and one of the respondents have consented to filing of the attached brief *amicus curiae*, *amici* have been unable to obtain the consent of the remaining respondents.

2. The decision of the Washington State Supreme Court upholding the respondents' taking of bondholders' property

without payment of just compensation raises questions of far-reaching importance to the national municipal bond market.

3. As explained more fully in the attached brief, the decision below will substantially and adversely affect the *amici* as purchasers and underwriters of billions of dollars in municipal bonds. For that reason, *amici* have a vital and continuing interest in the outcome of this litigation that can only be protected by prompt review by this Court.

4. Accordingly, *amici* seek this opportunity to make their views known to the Court and assist the Court in its decision on the Petition for a Writ of Certiorari.

Counsel for *amici* hereby request that the Court grant this Motion for Leave to File Brief *Amicus Curiae*.

Respectfully submitted,

Of Counsel:

LAURENCE H. TRIBE
1525 Massachusetts Ave.
Griswold Hall 307
Cambridge, Mass. 02138
(617) 495-1767

/s/ Herbert M. Wachtell

HERBERT M. WACHTELL*
LAWRENCE B. PEDOWITZ
WAYNE M. CARLIN
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for Amicus Curiae Salomon Brothers Inc

PHILIP C. POTTER, JR.*
DAVIS POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

Counsel for Amicus Curiae Smith Barney, Harris Upham & Co. Incorporated

**Counsel of Record*

LEONARD JOSEPH*
DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
140 Broadway
New York, New York 10005
(212) 820-1100

Counsel for Amicus Curiae
Prudential-Bache
Securities Inc.

WILLIAM F. KOEGEL*
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000

Counsel for Amicus Curiae
Merrill Lynch, Pierce,
Fenner and Smith,
Incorporated

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QUESTION ADDRESSED

Is the decision of the Supreme Court of the State of Washington in conflict with this Court's decisions interpreting the Taking Clause, particularly *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980)?

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INTEREST OF THE *AMICI*

This litigation involves the largest governmental confiscation of private property in American history. Private parties residing throughout the United States made loans to agencies of the State of Washington, and those agencies subsequently repudiated their own unequivocal commitments to repay principal and interest. This repudiation—combined with the Washington State Supreme Court's ruling that no compensation was due or owing to the private parties—effected an uncompensated taking of private property of unprecedented dimensions.

The Washington Public Power Supply System ("WPPSS") issued to private parties $2.25 billion in bonds under the supervision, and for the benefit, of 88 municipalities, public utility districts, and electric cooperatives located in six states (the "Participants"). The Participants initiated and approved WPPSS' issuance of the bonds in order to provide financing for construction of two nuclear power plants that were designed to provide electric power for the Participants' customers.

To induce prospective bondholders to lend their money, the Participants unconditionally guaranteed repayment of principal and interest whether or not the nuclear plants were ever completed and repeatedly represented to the bondholders that the Participants had the authority to make these guarantees. After the Participants had caused the bondholders' funds to be spent for construction of the plants, construction was terminated before completion. Many of the Participants then abruptly repudiated their unconditional guarantees, refusing to return any portion of the money borrowed or to pay the agreed-upon interest.

In a decision that sent shock waves throughout the investment community, *see, e.g., Up From Whoops*, Wall St. J., Aug. 13, 1984, at 16, col. 1 (editorial characterizing the decision as "strange" and "corrupting"), the Washington State

Supreme Court held that most of the Washington Participants, although acting on behalf of the state, had lacked statutory authority to enter into the unconditional guarantees. Pursuant to that ruling, a subsequent decision of the Washington trial court absolved *all* of the Participants, including those from other states, of any obligation to repay. The Participants' repudiation, as countenanced by these rulings, caused WPPSS to default on the bonds. In a subsequent decision, the Washington Supreme Court affirmed the rulings below and rejected each and every legal and equitable state law and constitutional claim for relief pressed by the bondholders, including a claim under the Taking Clause, thus imposing on unsuspecting bondholders throughout the United States the full cost of the Participants' public projects.

Amici (the "Underwriters") are four of the nation's leading investment banking firms, annually leading syndicates underwriting over $10 billion in municipal securities. The Underwriters led syndicates consisting of hundreds of other underwriting firms that purchased the bonds at issue in this case and then resold them to customers. In purchasing and selling the bonds, the Underwriters acted throughout in reliance upon the Participants' unconditional guarantees.

The bondholders, justifiably aggrieved by the Participants' repudiation, have sought recompense by commencing securities fraud actions in federal court against virtually all parties involved in the financing and construction of the nuclear plants, naming numerous defendants, including the Underwriters, and seeking billions of dollars in damages. These actions are virtually unmatched in scope, involving over one hundred parties and as many law firms, with millions of dollars in legal fees already incurred and continuing to mount.[1]

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1 These actions do not provide a clear path to any meaningful recovery for the bondholders, since each cause of action asserted imposes the difficult requirement that the plaintiffs make a showing of wrongdoing *ab initio* (*i.e.*, a showing that false representations were the result of scienter or culpable negligence).

The Underwriters believe that the decisions of the Washington Supreme Court are not only in conflict with this Court's prior decisions interpreting the Taking Clause, U.S. Const. amend. V, but that this case presents issues of vital and continuing importance concerning the appropriation of private property for public use without compensation. So long as the decisions of the Washington Supreme Court stand as precedent, they will continue to undermine the stability of the municipal bond market, increase the cost of municipal financing, and discourage investors from extending loans to municipal borrowers for fear that their property will be similarly confiscated.

STATEMENT

The Participants wished to build the two nuclear plants without having to advance their own money (*i.e.*, their ratepayers' funds) until the plants could be completed. They engaged WPPSS, a joint operating agency and municipal corporation created by Washington law, to build the two plants and to finance construction through the sale from 1977 to 1981 of fourteen offerings of bonds.

The Participants contracted with WPPSS to purchase percentage shares of the power to be generated by the plants, agreeing to pay to WPPSS a prorated share of the costs of constructing the plants, including amounts required to pay the principal and interest due on the bonds. To persuade investors to finance this public venture, the Participants contractually committed that the bonds would be repaid out of the Participants' revenues whether or not the plants were ever completed and ever generated electricity. (The Participants further covenanted to raise their rates—which they represented to be unregulated—to whatever extent necessary to generate sufficient revenues to satisfy their commitment to fund payment of the bonds.) These so-called unconditional "dry hole" commitments of the Participants were in common and unquestioned usage in the power industry at that time. These commitments also constituted the only security for the bonds.

Throughout the four-year period during which the bonds for these two plants were marketed, the Participants repeatedly affirmed to prospective bondholders their intention to repay the loans and fulfill their "dry hole" commitments. Counsel for each Participant furnished to WPPSS an opinion letter stating, *inter alia*, that the Participant's obligations, including the "dry hole" commitment, constituted valid and binding obligations of the Participant. The fourteen Official Statements subsequently issued by WPPSS in connection with the bond offerings—approved by representatives of the Participants and intended for bondholder examination—each described the Participants' unconditional "dry hole" commitment and annexed opinion letters from WPPSS' special counsel and bond counsel stating that this commitment imposed valid and enforceable obligations. Investors in municipal bonds look to such expert opinions as critical confirmation of the security of a prospective investment, and they will not purchase bonds in the absence of a favorable opinion of bond counsel. The bondholders relied on all of these repeated and explicit assurances that the Participants had the authority and intent to repay.

The representations of Washington State did not stop with the Participants or WPPSS itself. The State Auditor also directly confirmed for bondholders that the Participants' contractual commitments were valid and binding. From 1976 through 1980, the State Auditor each year examined the operations of WPPSS and certified its "financial condition and resources" and compliance with the laws of the State. (With respect to the construction of the two nuclear plants, the only meaningful "financial resources" WPPSS could claim were, of course, the Participants' obligations to make payments.)[2]

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2 The State Auditor subsequently reported to the Washington State legislature that among the reasons for treating the Participants' contractual agreements as liabilities of the utilities was the fact that the Participants were "unconditionally obligated for repayment of [the WPPSS debt] whether or not the projects are completed, operable or operating . . . ." Memorandum No. 81-17, Senate Energy and Utilities Committee Files, at 1-2.

Moreover, examination of the only published adjudicatory decisions concerning the validity of the Participants' contractual commitments issued prior to the Participants' repudiation of their obligations would also have led inevitably to the conclusion that the commitments were valid. In licensing proceedings commenced by WPPSS for the benefit of the Participants, the Nuclear Regulatory Commission—at the instance of WPPSS—determined that WPPSS had adequate financing to insure safe construction of its plants and therefore issued construction permits for the two plants. This determination was expressly premised upon findings of fact and conclusions of law that the Participants were obligated to satisfy their contractual commitments. *In re Washington Public Power Supply System*, 7 N.R.C. 599, 630, 639 (1978); *In re Washington Public Power Supply System*, 7 N.R.C. 254, 257-58, 269 (1978).

Prior to the time that the plants were faced with large cost overruns and a moratorium on construction, there was no hint of any question raised by any person concerning the validity of the "dry hole" commitments. As the Washington Supreme Court noted, "all parties assumed that statutory authority existed." *Chemical Bank* v. *Washington Public Power Supply System*, 102 Wash. 2d 874, 899 (1984). Then, after the WPPSS Board of Directors, with the consent of the Participants, terminated the projects on January 22, 1982, certain of the Participants abruptly reversed their prior position and proceeded to repudiate their "dry hole" commitments, refusing even to return the principal amount of the bonds.

As is fully detailed in the petition filed by petitioner Chemical Bank, the Washington Supreme Court subsequently held, in two surprising decisions, not only that the Participants' contractual commitments were void and unenforceable, but also that no relief whatsoever was available to the bondholders under state law or equity (or under the Constitution of the United States)—in short, the Participants were wholly excused from any obligation to pay either principal or interest on the loans. *See* Chemical Pet. at 9-13; *Chemical Bank* v. *Washington Public Power Supply System*, 102 Wash. 2d 874 (1984)

(*Chemical Bank II*); *Chemical Bank* v. *Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983) (*Chemical Bank I*).

The Underwriters do not here seek to challenge the state court's interpretation of Washington law—no matter how questionable its rulings on that subject appear to have been.[3] Rather, the Underwriters assert that when the upshot of the Washington Supreme Court's ratification of the Participants' repudiation is to deny the bondholders *any* avenue of recourse under *any* theory of state law, that result brings about a taking of the bondholders' private property without just compensation in violation of controlling federal constitutional law.[4]

SUMMARY OF ARGUMENT

This case falls squarely within the analytical framework this Court has employed in its recent Taking Clause decisions: the character of the governmental action involved here, its economic impact, and its interference with the bondholders' reasonable investment-backed expectations all point to a violation of the Taking Clause. Moreover, the decision of the Washington Supreme Court is in direct conflict with this Court's holding in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980).

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3 As the Chemical Bank petition demonstrates, the Washington court's handling of each of the bondholders' claims was marked by hypertechnical and tortured reasoning in which every issue was resolved in favor of the Participants. *See* Chemical Pet. at 23-27.

4 Because the Underwriters view this case as readily resolvable on Taking Clause grounds, the Underwriters do not believe it necessary to reach any issues under the Contract Clause, although it is noteworthy that this Court has consistently protected private parties from attempts by states to repudiate the obligations of their own securities. *E.g.*, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) (bonds); *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935) (bonds).

ARGUMENT

The elements of the taking at issue in this case are uncomplicated. *First*, one group of entities of the State of Washington (Washington municipal and PUD Participants), together with WPPSS (itself a municipal corporation of the State of Washington)—undeniably acting under color of state law—were responsible for borrowing $2.25 billion from private bondholders, promising to repay both principal and interest. *Second*, the Participants failed to return any portion of the funds, totally repudiating their repayment obligations. *Third*, another entity of the State of Washington (the Washington Supreme Court) sanctioned this total repudiation, denied the availability of any and all judicial remedies, and definitively decreed that no compensation would be forthcoming. The deliberate inducement by state instrumentalities of this transfer of private funds, the repudiation by those state entities of the obligation to repay, and the judicial sanctioning of this repudiation constitute a clear and massive uncompensated taking of property by the State of Washington in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

A. The actions of state agencies and the decisions of the Washington Supreme Court give rise to an unconstitutional taking under this Court's recent decisions.

While analysis of any Taking Clause claim requires an "essentially ad hoc, factual" inquiry, *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), the Court has identified three factors that are to be examined in determining whether an unconstitutional taking has occurred. These factors are "[1] the character of the governmental action, [2] its economic impact, and [3] its interference with reasonable investment-backed expectations." *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980). *See, e.g., Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2875 (1984); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979).

In this case, "the character of the governmental action" is blatantly confiscatory. This is not a case in which property is being taken in order to advance some social policy of the state. *Cf. Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (landmark preservation). Moreover, here no single "stick" from "the bundle of rights that are commonly characterized as property" is being taken. *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Rather, by denying the bondholders not only the agreed-upon interest for the use of their funds but also any right to simple restitution of the principal amount they had loaned, the state has confiscated each and every "stick" from the "bundle"—an action that clearly amounts to an unconstitutional "taking." *See Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979).

Likewise, the "economic impact" of the state's action is draconian. The "dry hole" commitment was the sole security for the bonds, and it has been totally destroyed. State agencies received loans of $2.25 billion, and the state has decreed that they need return nothing. The "economic impact" on the bondholders' assets is thus every bit as devastating and complete as would be a "physical invasion [of tangible property] by government." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *see, e.g., United States* v. *Causby*, 328 U.S. 256 (1946).

In assessing Taking Clause claims, recent decisions of this Court have attached particular significance to the third factor—governmental interference with "the reasonable investment-backed expectations" of private parties. *See Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2875 (1984); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). In this regard, the Court has repeatedly found that government representations that preexisting property will not be damaged or interfered with by governmental actions create protectible investment-backed expectations which the government may not destroy without paying just compensation. *See Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2877-78 (1984) (federal agency's representation that trade secret information provided to the government would be kept confidential

"formed the basis of a reasonable investment-backed expectation" that must be compensated if frustrated); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979) (representations of government officials to private owners of a pond that they would continue to have exclusive use of the pond after dredging a channel linking it to a navigable waterway "can lead to the fruition of a number of expectancies embodied in the concept of 'property' "). *Cf. United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 20 n.17, 27 n.26 (1977) (express promises made by government give rise to protectible expectations, with compensation due if such expectations are then destroyed).

Here, the State endeavored mightily to create the bondholders' unquestionably reasonable investment-backed expectations that they would be repaid their principal, together with interest. In order to induce bondholder loans, the Participants and WPPSS (agencies of the state) repeatedly and continuously promised and advertised to prospective bondholders and the investing public the Participants' "dry hole" commitments. Expert bond counsel employed by WPPSS rendered a frequently published opinion that the Participants' obligations were valid and enforceable. The State Auditor publicly certified the financial condition of WPPSS, which was critically dependent on the validity of the "dry hole" financing mechanism. Moreover, in order to obtain the licenses required to construct nuclear plants, WPPSS, on the Participants' behalf, convinced the Nuclear Regulatory Commission, a federal agency acting in an adjudicatory proceeding, to adopt and publicly issue findings of fact and conclusions of law to the effect that the Participants were obligated to make the payments under their "dry hole" commitment.

It is also highly significant that the investors in this case purchased *bonds*. While other kinds of investments (*e.g.*, purchases of equity securities) may create "reasonable investment-backed expectations," the expectations associated with a bond are unique. With a bond, an investor gives up his property (in the form of money paid for the bond) temporarily (for the term of the bond) with the firm expectation, memorial-

ized in a written unambiguous instrument, that the investor will get back the property loaned (the principal) with interest. *Cf. United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 27 n.26 (1977).

In these circumstances, the bondholders had every reason to believe that the transactions they had entered into were what the State repeatedly and unequivocally represented them to be—namely, normal, traditional and secure municipal bond transactions. As the Washington Supreme Court itself was compelled to find, "all parties assumed statutory authority existed." *Chemical Bank II*, 102 Wash. 2d at 899.

B. The decisions of the Washington Supreme Court directly conflict with this Court's holding in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*.

The unadorned pronouncement of the Washington Supreme Court that "no taking occurred," *Chemical Bank II*, 102 Wash. 2d at 912, conflicts squarely with this Court's holding in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980). *Webb's* stands for the principle that the Taking Clause prohibits a state from redefining traditional property interests by *ipse dixit* in order to evade the constitutional requirement of just compensation. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) ("[T]he government does not have unlimited power to redefine property rights.") (citing *Webb's*); *see also Hughes* v. *Washington*, 389 U.S. 290, 296-97 (1967) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.") (Stewart, J., concurring).

In *Webb's*, a pharmacy chain called Eckerd's had agreed to purchase Webb's, another chain. At the closing, Webb's debts appeared to exceed the agreed-upon purchase price. In order to be assured of becoming the owner of Webb's, Eckerd's availed itself of a state statutory procedure by which it could tender the purchase price to the court and file a complaint of inter-

pleader in state court, interpleading as defendants Webb's and its creditors. *See* 449 U.S. at 156-57.

The state court then ordered that the amount tendered as the purchase price be paid to the clerk of the court and that the clerk deposit the tendered fund in an assignable interest-bearing account, retaining for the state the interest earned on the fund during its deposit pursuant to a statute declaring that "interest accruing from moneys deposited shall be deemed income of the office of the clerk . . . ." The clerk also deducted from the tendered fund a statutorily determined service fee. The court subsequently appointed a receiver, to whom the clerk delivered the fund, less the interest earned and the statutory fee. *See id.* at 156-58 & n.1.

The receiver thereupon brought a proceeding to gain possession of the nearly $100,000 in interest earned on the fund, claiming that, notwithstanding the state statute, the interest should not be viewed as state property but should have followed the principal. The Florida Supreme Court ultimately upheld the state statute against constitutional challenge, ruling that the interest was public property, because, in the absence of the statute, the clerk would have lacked authority to invest the money, and "[t]here is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property." *Beckwith* v. *Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951, 953 (Fla. 1979); *see* 449 U.S. at 158-59.

This Court reversed in a unanimous opinion delivered by Justice Blackmun. The opinion began by noting that there was no question that the principal sum deposited with the state court was private property, 449 U.S. at 160, and that the interest was clearly not owing to the state as a fee for the clerk's services, since a separate statutory fee was required and paid. *Id.* at 162. The Court then noted "[t]he usual and general rule . . . that any interest on an interpleaded and deposited fund follows the principal," *id.*, and flatly rejected the reasoning of the Florida Supreme Court that the interest would be treated as public property simply because a state statute declared it to be so, holding:

> [A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.
>
> —*Id.* at 164.

Webb's clearly shows that the actions of the Participants ratified by the Washington Supreme Court give rise to a "taking" in the present case. Both *Webb's* and the instant case involve voluntary commercial transactions in which private parties' money was tendered to state entities. In *Webb's*, the money was deposited in court in connection with a voluntary purchase of the debtor's assets. In *Chemical Bank II*, the bondholders' money was loaned to WPPSS in a voluntary exchange for bonds carrying a promise to repay principal and interest. In both cases, a taking was consummated when state entities refused to give back what they had temporarily been given *and* a state court not only upheld the refusal but declined to award any compensation. The taking, in short, was completed here when the Participants repudiated their obligation to repay and the Washington Supreme Court endorsed that repudiation by holding that the bondholders were entitled to return of neither principal nor interest on their loans.

Indeed, the conclusion that an unconstitutional taking occurred here follows *a fortiori* from *Webb's*. The clerk in *Webb's* "took" only the interest on a fund—one of many sticks in the "bundle of property rights"—while the Washington Supreme Court has permitted state entities to take the entire bundle, *i.e.*, principal and interest. The character of the governmental action in this case and its economic effect are thus dramatically more confiscatory than in *Webb's*.

The parties in *Webb's* were also on far shakier ground than the bondholders here in pressing the reasonableness of their investment-backed expectations. Prior to the deposit in court in *Webb's*, all parties were aware of the Florida statute explicitly "warning" that interest earned on the fund would be retained by the clerk and was not their property. *See* 449 U.S. at 157. The notion that the parties might have been able to

overturn Florida's statute on constitutional grounds would have been essentially speculative. By contrast, prior to the bondholders' loans, the Participants, WPPSS, their counsel, and the State Auditor gave the bondholders every reason to believe that the "dry hole" commitments were unassailable, and the surprising *post hoc* decision of the Washington Supreme Court to the contrary could not remotely have been foreseen by the bondholders.

The only shadow the Washington Supreme Court even attempted to cast over the reasonableness of the bondholders' expectations was its suggestion that the bondholders should have brought a declaratory judgment action at the outset to determine the validity of the Participants' "dry hole" commitment. *See Chemical Bank II*, 102 Wash. 2d at 906. The Washington court thus essentially ruled that the bondholders' failure to seek such a prior judicial declaration effectively converted the bondholders' legitimate investment expectancy into an unwarranted speculation requiring no legal protection. But the suggestion that—even in the absence of any dispute or question having been raised as to validity—every time a municipal security is offered for sale in this nation, a prospective bondholder must obtain a prior declaratory judgment certifying the municipality's authority to issue the security (or else run the risk of being found, to use the terminology of the Washington Supreme Court, guilty of "neglect") not only defies common sense, but would also undermine the prompt and efficient workings of the nation's municipal capital markets. Moreover, the Washington Supreme Court's logic would even more clearly have required a different result in *Webb's*, since there, too, none of the parties sought a declaratory judgment before the fund was deposited in court—notwithstanding the fact that in *Webb's* the existence of a "controversy" was manifest from the outset.[5] Furthermore, the Washington court's logic ignores the repeated—and unques-

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5 There is no question that Florida's declaratory judgment procedure would have been available to the parties. *See* Fla. Stat. Ann. §§ 86.011-.111 (West Supp. 1984).

tioned—chorus of state assurances to prospective bondholders vouching for the validity of the "dry hole" commitments and is thus totally inconsistent with this Court's repeated protection of "*reasonable* investment-backed expectations."[6]

This is not to say that the bondholders supposed their loans to be devoid of all risk. For example, they clearly and necessarily assumed the risk that market price fluctuations could depress the trading value of the bonds and the risk that the Participants might become insolvent and therefore incapable of making payments. However, in light of the repeated representations of the state agencies that the contractual commitments were valid, the one risk that the bondholders most assuredly did *not* assume was that a court would one day deem the Participants to have lacked authority to enter into these commitments. And, *a fortiori*, the bondholders cannot be deemed to have assumed the risk that the same court would determine that they were entitled to receive no compensation whatsoever—not even restitution of the principal amount they had lent to the State. In short, the Washington Supreme Court manifestly overstepped constitutional bounds when it held, in effect, that the bondholders assumed the risk of an unconstitutional state confiscation of their entire "bundle" of property rights: principal as well as interest.[7]

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6 It should also be noted that Chemical Bank, in its petition, demonstrates that, based upon the terms of the Washington statutes, the declaratory judgment procedure did not appear to be available to the bondholders until the Participants repudiated their obligations and created a justiciable controversy. *See* Chemical Pet. at 19 & n.11.

7 The bondholders are entitled under the Taking Clause not only to restoration of their principal, but also to payment of interest as compensation to them for the *temporary* taking of the beneficial use of their money. *See San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 653-58 (1981) (Brennan, J., joined by Stewart, Marshall and Powell, JJ., dissenting); *accord, id.* at 633-34 (Rehnquist, J., concurring); *United States* v. *Clarke*, 445 U.S. 253, 257 (1980); *United States* v. *Causby*, 328 U.S. 256, 258-59 (1946).

This case thus presents the basis for a critically important, yet straightforward, decision by this Court, reaffirming the Court's prior decisions restricting governments' ability to take private property without just compensation. The Court need only hold that, when state agencies obtain property from private parties by repeatedly assuring governmental repayment with interest, the state is not free later to declare that the investment-backed expectations it created did not constitute a "loan," but a "gamble," entitled to no legal protection whatsoever.

If the decisions of the Washington Supreme Court are permitted to stand, a gaping hole will have been cut into the Taking Clause as interpreted in *Webb's*—indeed, one large enough to swallow much of our fundamental institution of private property. When states are free to avoid the costs of just compensation and the rigors of eminent domain by the expedient of first having state agencies "borrow" private property, and then having state courts judicially "discover" that the state agencies lacked statutory authority to engage in the borrowing, the institution of private property is clearly under attack. If the Washington Supreme Court's decisions are not reviewed and ultimately reversed, municipal bond offerings will become "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

LAURENCE H. TRIBE
1525 Massachusetts Ave.
Griswold Hall 307
Cambridge, Mass. 02138
(617) 495-1767

HERBERT M. WACHTELL*
LAWRENCE B. PEDOWITZ
WAYNE M. CARLIN
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for Amicus Curiae Salomon Brothers Inc

PHILIP C. POTTER, JR.*
DAVIS POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

Counsel for Amicus Curiae Smith Barney, Harris Upham & Co. Incorporated

LEONARD JOSEPH*
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway
New York, New York 10005
(212) 820-1100

Counsel for Amicus Curiae Prudential-Bache Securities Inc.

* *Counsel of Record*

WILLIAM F. KOEGEL*
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000

Counsel for Amicus Curiae
Merrill Lynch, Pierce, Fenner
and Smith, Incorporated

* *Counsel of Record*